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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

JOHN W. POULOS et al., Plaintiffs and Appellants, v. ALPINE MEADOWS SKI CORPORATION, Defendant and Respondent.	C037734 (Super. Ct. No. S CV 9454)

John and Deborah Poulos ("the Pouloses") appeal from a summary judgment in favor of Alpine Meadows Ski Corporation ("Alpine").

The Pouloses sued Alpine for personal injuries and loss of consortium resulting from injuries John Poulos ("Poulos") sustained while participating in a ski lesson at Alpine. The Pouloses claimed the ski instructor had Poulos ski an unsafe run as part of the lesson. Alpine moved for summary judgment on the grounds of primary and express assumption of the risk. The trial court granted Alpine's motion, determining that under

the doctrine of primary assumption of the risk, there was no evidence of a triable issue of material fact that the "ski instructor unreasonably, intentionally, or recklessly increased the inherent risk in learning to ski." We disagree and reverse.

DISCUSSION

1. *Standard of Review*

An appellate court independently reviews the summary judgment record.[1] Initially, we identify the issues framed by the pleadings because the motion must respond to those allegations.[2] A defendant's motion must "'"conclusively negate[] a necessary element of the plaintiff's case or demonstrate[] that under no hypothesis is there a material issue of fact that requires the process of trial." [Citation.]'"[3]

Should the moving defendant meet this burden, the plaintiff must present evidence of a triable issue of fact.[4] Such a showing must be based on "specific facts" and not "mere allegations . . . of its pleadings."[5] We liberally construe the opposing party's evidentiary submissions while strictly

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[1] *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (*Saelzler*).

[2] *Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 734.

[3] *Saelzler*, supra, 25 Cal.4th at page 767.

[4] *Shively v. Dye Creek Cattle Co.* (1994) 29 Cal.App.4th 1620, 1627 (*Shively*).

[5] Code of Civil Procedure section 437c, subdivision (o)(2).

construing those of the movant.[6] All doubts are resolved in favor of the opposing party.[7]

2. *The Pleadings*

Poulos took a mogul ski lesson at Alpine on January 5, 1999. He alleged Alpine contracted to provide him with instruction "in the area of beginner mogul skiing, the safe handling of the moderate mogul conditions." Poulos claimed he specifically requested that his lesson take place "in an area which was safe and non-dangerous and in an area which was commensurate with [his] abilities and experience level." Furthermore, Poulos contended that Alpine was "reckless, wrongful, and grossly" negligent when it directed and instructed him to ski onto the ski run where he sustained his injuries. Poulos claimed the run was "a dangerously icy [and] moguled steep chute which was located on the black diamond ski run referred to as 'A Chute that Seldom Slides' which [Alpine] knew was beyond the ability and experience level of [Poulos]." Poulos asserted that Alpine had a duty to ensure that participants in ski instruction programs were "properly and safely trained, instructed, guided, and supervised" in compliance with the United States Professional Ski Association and United States Professional Ski Instructor's guidelines and standards. Finally, Poulos maintained that Alpine knew or should have known of the dangerous conditions of the area where

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[6] *Saelzler*, supra, 25 Cal.4th at page 768.

[7] *Shively*, supra, 29 Cal.App.4th at page 1627.

his injury occurred as well as his "limited abilities . . . in mogul skiing and his limited physical abilities."

3. *Alpine's Summary Judgment Motion*

Alpine maintains that the defenses of primary assumption of the risk and express assumption of the risk bar the Pouloses' claims. Specifically, Alpine contends that Poulos's injuries resulted from the inherent risks of skiing and that it owed no duty to protect Poulos from those inherent risks; therefore, the doctrine of primary assumption of the risk bars the Pouloses' claims. Additionally, Alpine asserts that Poulos signed an express release of liability when he purchased a pack of ten lift tickets ("10PAK").

4. *Pouloses' Opposition to Alpine's Summary Judgment Motion*

The Pouloses claim that secondary, not primary, assumption of the risk governs the case because Alpine's "reckless ski instruction increased the risk of harm to [Poulos] and subjected him to an extreme risk of serious injury." Additionally, Poulos asserts that the liability release he signed did not apply on the day of the incident because he did not use a ticket from the 10PAK that day. Poulos also asserts there is a triable issue of fact as to whether that release applies to Alpine's misconduct during a ski lesson. Finally, Poulos maintains that the lift ticket he did use on the day of the accident did not require him to sign a liability release, nor was such a signature required when he signed up for the ski lesson. Having this brief background in mind, we now turn to the issues.

5. *Express Assumption of the Risk*

Express assumption of the risk arises when parties expressly agree that a defendant owes no duty to protect the plaintiff from a particular risk.[8] As with primary assumption of the risk, express assumption of the risk means the plaintiff gave express consent, in advance, to relieve the defendant of liability for an injury caused by the defendant's breach of the duty of care.[9] "'The result is that the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence.'"[10] Provided the release comports with public policy, the agreement poses a complete bar to the plaintiff's negligence cause of action.[11]

General contract principles govern release agreements.[12] "'[A] release must be clear, unambiguous and explicit in expressing the intent of the parties.'"[13] Whether the terms

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[8] *Knight v. Jewett* (1992) 3 Cal.4th 296, 308, footnote 4 (*Knight*).

[9] *Knight*, *supra,* 3 Cal.4th at pages 308-309, footnote 4.

[10] *Knight*, *supra,* 3 Cal.4th at page 309, footnote 4, quoting Prosser & Keeton on Torts (5th ed. 1984) section 68, pages 480-481, italics omitted.

[11] *Knight*, *supra,* 3 Cal.4th at page 309, footnote 4, citing *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 95-101 and *Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 597-602.

[12] *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554 (*Appleton*).

[13] *Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 622, quoting *Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598.

of the release are clear, unambiguous and explicit is a question of law.[14] Such agreements are interpreted against the drafter.[15] Parol evidence is properly admitted to construe an agreement when its language is ambiguous.[16] The test of admissibility in such cases is "whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.'"[17]

Prior to the 1998-1999 ski season, Poulos purchased a 10PAK coupon book. The holder of a 10PAK may exchange one coupon for one lift ticket. However, on the day of his accident, January 5, 1999, Poulos did not use a coupon from his 10PAK. Rather, Poulos used his POWDR card to purchase a lift ticket; he also purchased a ski lesson. Alpine claims that the release of liability and indemnity agreement printed on the back of the 10PAK order form bars Poulos's cause of action. Although Alpine claims that the lift ticket Poulos used on the day of the incident also contained express assumption of risk language, Alpine waived any reliance on that language by stating that its affirmative defense of express assumption of the risk was not premised upon that language, but only upon the language

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[14] *Sanchez v. Bally's Total Fitness Corp.* (1998) 68 Cal.App.4th 62, 69 (*Sanchez*).

[15] *Lund v. Bally's Aerobic Plus, Inc.* (2000) 78 Cal.App.4th 733, 738 (*Lund*).

[16] *Appleton*, supra, 27 Cal.App.4th at page 554.

[17] *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165, quoting *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.

of the agreement printed on the back of the 10PAK order form.

The 10PAK order form release states:

"RELEASE OF LIABILITY AND INDEMNITY AGREEMENT

> "I understand that the sport of skiing and snowboarding can be dangerous and involves the risk of injury and death. Despite the risk involved in the sport and in consideration of my right to participate in the sport, I AGREE TO EXPRESSLY ASSUME ANY AND ALL RISK OF INJURY OR DEATH which might be associated with my participation in the sport of skiing and snowboarding and use of the facilities at Alpine Meadows, including chairlifts.
>
> "I AGREE NEVER TO SUE AND TO RELEASE FROM LIABILITY ALPINE MEADOWS SKI CORPORATION, ALPINE MEADOWS OF TAHOE, INC., POWDR CORP., THE UNITED STATES OF AMERICA, DEPARTMENT OF AGRICULTURE, FOREST SERVICE, and their owners, employees, agents, landowners and affiliated companies (hereinafter collectively referred to as "ALPINE MEADOWS") for any damage, injury or death to me arising from my participation in the sport of skiing and snowboarding and my use of the facilities at Alpine Meadows regardless of cause.
>
> "I understand this is a RELEASE OF LIABILITY which will prevent me or my heirs from filing suit or making any claim for damages in the event of injury or death to me. Additionally, in the event I file or, my child, the user, or my legal representative files a claim or a lawsuit arising out of the sport of skiing or snowboarding or the use of the facilities at ALPINE MEADOWS, I AGREE TO DEFEND, INDEMNIFY AND HOLD HARMLESS ALPINE MEADOWS, for any damages, attorneys' fees or costs arising out of such a claim or a lawsuit. With the aforesaid fully understood, I nevertheless enter into this agreement freely and voluntarily and agree that it is binding upon me, my child, the user, my heirs, assigns and legal representatives.
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> "I understand and agree that this agreement will be interpreted under California law. Also[,] if any clause is found to be invalid[,] the balance

of the contract will remain in effect and will be valid and enforceable.

"SIGNATURE OF 10-PAK HOLDER #1_____ DATE_____"

Preliminarily, we note that releases of liability encompass only negligent conduct and do not extend to reckless behavior.[18] As we explain in the next section of this opinion, Poulos has raised a triable issue of material fact that Alpine acted recklessly during the ski lesson. For this reason alone, then, the release does not bar the Pouloses' claims.

In any event, the language of the 10PAK release does not indicate that it applies when the holder is not using a 10PAK ticket. Nor is there any indication that the holder would understand that the terms would apply even when not using a 10PAK lift ticket. Recently, this court encountered a similar issue in *Solis v. Kirkwood Resort Co.*[19] There, the release applied to a season pass that the plaintiff could use Monday through Friday. However, the accident took place on a Sunday, and the plaintiff had purchased a separate day pass for that Sunday that did not contain a release. We concluded, in reversing a summary judgment against the plaintiff, that it was plausible the parties intended the season pass release to apply only to the Monday-through-Friday period.[20]

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[18] See *Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1372 (*Allan*); see also *Knight, supra,* 3 Cal.4th at pages 308-309, footnote 4.

[19] *Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354 (*Solis*).

[20] *Solis, supra,* 94 Cal.App.4th at pages 361-362.

Alpine cites *Sanchez v. Bally's Total Fitness Corporation* for the proposition that because the plaintiff in *Sanchez* signed a release five years before her accident, Poulos is barred from recovery because he signed a release in conjunction with his 10PAK.[21] Alpine also cites *Paralift, Inc. v. Superior Court* for a similar proposition.[22] The *Paralift* court held that a release was not invalidated by the fact that it was three years old.[23] What Alpine fails to point out, however, is whether Poulos had a release on file that an Alpine employee would check prior to selling Poulos the POWDR card lift ticket or signing him up for a ski lesson. Furthermore, Alpine fails to cite any language in the 10PAK release stating that it would apply to skiing other than when a 10PAK ticket is used.

The release in *Paralift* is also distinguishable because nothing within its terms limited it to a particular number of skydive jumps. Unlike the 10PAK release, which is limited to the use of 10PAK lift tickets, the duration of the *Paralift* release was indefinite. At issue in *Paralift* was whether a release--which required the decedent to initial in 22 places and watch a video, which explained the waiver and warned him to obtain the advice of counsel prior to signing--applied to a jump that took place three years after the signing and in a different

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[21] *Sanchez, supra,* 68 Cal.App.4th at pages 64-65, 67.

[22] *Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 752 (*Paralift*).

[23] *Paralift, supra,* 23 Cal.App.4th at pages 756-758.

location than where the activities covered by the release originally began.[24] The *Paralift* court considered whether the release "[wa]s broad enough in scope to cover the activities on the day of the fatal jump, or whether such activities were of the type originally contemplated by the parties in entering into th[e] agreement."[25] The court determined that the release did not expire, nor was it limited to time, place, or type of activity.[26] The court held that "The evident intent of the parties was that the decedent could continue to use Paralift aircraft and pilot services on an ongoing basis for parachuting activities of a sporting nature. . . . [T]he decedent effectively reaffirmed his release and assumption of risk each time he stepped into a Paralift aircraft."[27]

Alpine cites *Lund v. Bally's Aerobic Plus, Inc.*, for the proposition that the release on the back of the 10PAK order form applies to Poulos's purchase of an additional session (ski lesson) independent of his purchase of the 10PAK.[28] The distinction between the instant action and *Lund* is that the record does not demonstrate that the 10PAK was a prerequisite to the ski lesson. In *Lund*, the plaintiff obtained additional sessions with the defendant fitness center's personal trainer;

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[24] *Paralift*, supra, 23 Cal.App.4th at pages 753-754.

[25] *Paralift*, supra, 23 Cal.App.4th at page 756.

[26] *Paralift*, supra, 23 Cal.App.4th at pages 756-757.

[27] *Paralift*, supra, 23 Cal.App.4th at page 756.

[28] *Lund, supra,* 78 Cal.App.4th at pages 735, 738.

however, an existing membership with the center--for which the plaintiff signed a liability release--was a condition to the purchase of personal training sessions.[29] Because the 10PAK was not used the day Poulos participated in the ski lesson and the record does not provide any evidence that the 10PAK release was a condition to the ski lesson, Alpine's analogy lacks merit.

We conclude that the affirmative defense of express assumption of the risk does not bar the Pouloses' claims.

6. *Primary Assumption of the Risk*

In *Knight v. Jewett*,[30] the California Supreme Court explained the primary and secondary assumption of risk doctrines. Primary assumption of the risk arises in "those instances in which the assumption of risk doctrine embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular risk."[31] Primary assumption of the risk is a complete bar to recovery.[32]

Secondary assumption of the risk, on the other hand, arises in "those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty."[33] Rather than posing a complete bar to recovery, the secondary

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[29] *Lund, supra,* 78 Cal.App.4th at page 738.

[30] *Knight, supra,* 3 Cal.4th 296.

[31] *Knight*, *supra*, 3 Cal.4th at page 308.

[32] *Knight*, *supra*, 3 Cal.4th at pages 314-315.

[33] *Knight*, *supra*, 3 Cal.4th at page 308.

assumption of risk doctrine is fused into the comparative fault scheme and the trier of fact considers the relative responsibility of the parties.[34]

The primary assumption of risk doctrine has been applied to the context of active sports. Thus, the general principle of negligence law that a defendant must use due care to avoid injury to others is deemed inapplicable in sports activities in which conduct that is otherwise viewed as dangerous is an integral aspect of the sport itself.[35] A defendant generally has no duty to "eliminate (or protect a plaintiff against) risks inherent in the sport itself."[36] An inherent risk is one that cannot be eliminated without altering the nature of the sport.[37] However, defendants "generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport."[38]

The *Knight* court was concerned that imposing legal liability for merely careless conduct in active sports would chill vigorous participation in sporting events, inhibit the natural play of the game, and alter the game's essential nature.[39] Therefore, the *Knight* court fashioned the general

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[34] *Knight*, *supra*, 3 Cal.4th at page 315.

[35] *Knight*, *supra*, 3 Cal.4th at page 315.

[36] *Knight*, *supra*, 3 Cal.4th at page 315.

[37] *Knight*, *supra*, 3 Cal.4th at pages 315, 317.

[38] *Knight*, *supra*, 3 Cal.4th at page 316.

[39] *Knight*, *supra*, 3 Cal.4th at page 318.

test: “a participant in an active sport breaches a legal duty of care to other participants--i.e., engages in conduct that properly may subject him or her to financial liability--only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.”[40] Conduct is deemed outside the range of ordinary activity involved in the sport if its prohibition “would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.”[41] A similar test has been applied to an instructor of an active sport.[42]

The *Knight* court stated that the primary assumption of the risk test “depends on the nature of the sport or activity in question and on the parties’ general relationship to the activity” rather than on the particular plaintiff’s subjective knowledge and awareness.[43] The ultimate query is whether, in light of this test, the defendant had a duty to protect

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[40] *Knight*, *supra*, 3 Cal.4th at page 320.

[41] See *Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1394 (*Freeman*).

[42] See *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112, 1117-1118; see also *Kane v. National Ski Patrol System, Inc.* (2001) 88 Cal.App.4th 204, 211-212 (*Kane*); *Bushnell v. Japanese-American Religious & Cultural Center* (1996) 43 Cal.App.4th 525, 532-534 (*Bushnell*); *Allan, supra,* 51 Cal.App.4th at page 1369.

[43] *Knight*, *supra*, 3 Cal.4th at pages 313-315, quoted material at page 313.

the plaintiff from the particular harm that caused the injury.[44] The court makes this determination of duty, as it is an issue of law.[45]

In assessing whether primary assumption of the risk applies here, we will consider the nature of the sport of mogul skiing, the instructor-student relationship of the parties, and whether Alpine, as the instructor, had a duty to protect Poulos from the injuries he sustained.

Alpine is correct in asserting that "moguls, icy snow conditions, falling, and collisions with other skiers and/or trees are inherent risks in the sport of snow skiing."[46] Alpine is mistaken, however, in thinking that this is enough for it to be granted summary judgment. If it were enough, a ski instructor, for example, could never be held liable for ordering a first-time skier to ski the most challenging expert run on the course as part of a novice ski lesson.

A dichotomy drawn by two decisions--*Galardi v. Seahorse Riding Club* and *Bushnell v. Japanese-American Religious & Cultural Center*--illustrates the interplay between inherent

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[44] *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068 (*Cheong*).

[45] *Knight*, *supra*, 3 Cal.4th at page 313.

[46] See *Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 12; see also *Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 827.

risks and sport instruction and sets forth the standard of liability that applies to sports instructors.[47]

In *Galardi*, the plaintiff was an accomplished equestrian who sustained injuries while training for an upcoming show.[48] The instructor-defendant twice raised the height of the jumps the plaintiff used for training without lengthening the distance between each jump, and had the plaintiff ride in the reverse direction.[49] After successfully jumping the first hurdle, the plaintiff's horse popped into the air before the second hurdle, resulting in the plaintiff's fall.[50] The court recognized that the inherent risks of horse jumping include falling and collisions with the jumps, and that the basic nature of the sport called for increasingly higher jumps at shorter intervals.[51] Although the court acknowledged that "the risk of injury . . . cannot be eliminated and in fact creates the challenge which defines the sport," the court concluded that the instructor owed the plaintiff a duty not to increase the inherent risks of the sport by "deploy[ing] the jumps at unsafe heights or intervals."[52] Because the *Galardi* plaintiff raised

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[47] *Galardi v. Seahorse Riding Club* (1993) 16 Cal.App.4th 817; *Bushnell, supra,* 43 Cal.App.4th 525.

[48] *Galardi, supra,* 16 Cal.App.4th at page 819.

[49] *Galardi*, supra, 16 Cal.App.4th at page 820.

[50] *Galardi*, supra, 16 Cal.App.4th at page 820.

[51] *Galardi*, supra, 16 Cal.App.4th at page 822.

[52] *Galardi*, supra, 16 Cal.App.4th at page 823.

a triable issue of material fact as to whether the instructor increased the inherent risks, summary judgment was inappropriate.

In *Bushnell*, the plaintiff broke his leg while performing a basic judo maneuver with his instructor during a judo class.[53] The appellate court considered whether taking precaution to protect the plaintiff from injury would interfere with the sport of judo.[54] Determining that the improvement of judo skills required the plaintiff to attempt the maneuver while increasing the speed each time, the court stated, "Absent evidence of recklessness, or other risk-increasing conduct, liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been the student's abilities."[55]

Bushnell clarified the standard of liability that applies to a sports instructor by characterizing *Galardi* in the following terms: "To the extent that the [*Galardi*] court found that the defendants [i.e., the instructor and the riding club] had failed to provide a safe environment for the plaintiff, we agree that liability might attach because the defendants thereby increased the risk inherent in the activity. If however, the court found that liability might attach because the defendants were negligent in asking the plaintiff to take on new challenges

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[53] *Bushnell*, supra, 43 Cal.App.4th at page 529.

[54] *Bushnell*, supra, 43 Cal.App.4th at page 531.

[55] *Bushnell*, supra, 43 Cal.App.4th at page 532.

in order to improve her skills, we do *not* agree that liability might attach, at least in the absence of evidence that the instructor acted recklessly or with an intent to cause injury. In other words, to the extent that a necessary or desirable part of the plaintiff's training was to ask her to take higher and higher jumps or take the jumps in various orders, the defendants should not be held liable simply because they were the plaintiff's instructors and it turned out that the plaintiff, or her horse, could not make the jump. If, however, the alteration in the course was such that it was reckless to ask the plaintiff to run it (i.e., the course was now unsafe), the instructors breached their duty to use due care not to increase the risks over and above those inherent in the sport, and liability should attach. The question, as always, is whether the imposition of liability would chill vigorous participation in the activity. To instruct is to challenge, and the very nature of challenge is that it will not always be met. It is not unreasonable to require a plaintiff who has chosen to be instructed in a particular activity to bear the risk that he or she will not be able to meet the challenges posed by the instructor, at least in the absence of intentional misconduct or recklessness on the part of the instructor. Any other rule would discourage instructors from asking their students to do anything more than they have done in the past, would therefore have a chilling effect on instruction, and thus would have

a negative impact on the very purpose for seeking instruction: mastering the activity."[56]

Three other decisions involving the doctrine of primary assumption of risk in the instructor-student context illustrate this dichotomy.

The first decision, *Tan v. Goddard*, falls on the *Galardi* side of the dichotomy.[57] There, an instructor increased the inherent risks of horse riding by knowingly providing his student a horse with an injured foot and instructing the student to jog the horse in the reverse direction of a particularly rocky track; the horse's leg gave way, and the student fell.[58] In reversing a summary judgment in favor of the instructor, the appellate court stated that the instructor had a duty to ensure that the horse he assigned his student was "safe to ride under the conditions he prescribed for that activity."[59]

The other two decisions fall on the *Bushnell* side of the dichotomy. In one, *Kane v. National Ski Patrol System, Inc.*, two expert skiers were candidates for the ski patrol.[60] For 10 weeks, they skied as candidate members of the ski patrol and assisted experienced patrollers and proved they were competent

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[56] *Bushnell*, supra, 43 Cal.App.4th at pages 533-534; see also *Solis, supra,* 94 Cal.App.4th at page 366.

[57] *Tan v. Goddard* (1993) 13 Cal.App.4th 1528 (*Tan*).

[58] *Tan, supra,* 13 Cal.App.4th at pages 1531, 1535.

[59] *Tan*, supra, 13 Cal.App.4th at page 1535.

[60] *Kane, supra,* 88 Cal.App.4th at page 206.

skiers.[61] Subsequently, the skiers participated in a clinic offered by the National Ski Patrol System to practice their basic skills in preparation for working with loaded and unloaded rescue toboggans.[62] The instructor, who had previously skied with the skiers and was familiar with their abilities, practiced some basic maneuvers and then took the skiers to the most difficult trail on the highest mountain of the resort.[63] The skiers expressed their reluctance to ski a portion of the trail that was spotted with trees, rocks, and stumps and adjacent to a canyon.[64] However, the instructor countered their reluctance by asking what they would do if a skier were over the edge.[65] While skiing the trail, one of the skiers fell over the edge and died from his injuries.[66] The appellate court recognized that with the benefit of hindsight, it would be easy to criticize the instructor's assessment of the difficulty of the terrain and the relative skill of the skier.[67] However, an instructor's errors in assessment--"either in making the necessarily subjective judgment of skill level or the equally subjective judgment about the difficulty of conditions"--are in no way 'outside the range

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[61] *Kane*, *supra*, 88 Cal.App.4th at page 207.

[62] *Kane*, *supra*, 88 Cal.App.4th at page 207.

[63] *Kane*, *supra*, 88 Cal.App.4th at pages 207-208.

[64] *Kane*, *supra*, 88 Cal.App.4th at page 208.

[65] *Kane*, *supra*, 88 Cal.App.4th at page 208.

[66] *Kane*, *supra*, 88 Cal.App.4th at pages 206, 208.

[67] *Kane*, *supra*, 88 Cal.App.4th at pages 212-213.

of the ordinary activity involved in the sport.'"[68] The court stated that "Instructors must of necessity make such judgments in order to sufficiently challenge skiers so that they will in fact improve their skills."[69] For assessment errors to reach the level of egregiousness sufficient to impose liability, then, the plaintiff needed to show that the instructor's conduct took the skier beyond the risks inherent in attempting to improve the skills of a skier already considered an expert.[70]

The other "*Bushnell*-side" decision is *Allan v. Snow Summit, Inc.*;[71] the plaintiff there participated in a beginner skiing lesson. After skiing the beginners' slope successfully, the instructor encouraged the reluctant novice to advance to the next challenge, a run that was slightly more difficult but still in the easy range.[72] Although the plaintiff fell numerous times, the instructor encouraged him to keep trying.[73] The following morning, the plaintiff was diagnosed with herniated discs in his lumbar spine.[74] The court held that "urg[ing] the student to go beyond what the student has already mastered" is inherent

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[68] *Kane*, *supra*, 88 Cal.App.4th at page 214.

[69] *Kane*, *supra*, 88 Cal.App.4th at pages 206, 214.

[70] *Kane*, *supra*, 88 Cal.App.4th at page 214.

[71] *Allan, supra*, 51 Cal.App.4th 1358.

[72] *Allan*, *supra*, 51 Cal.App.4th at pages 1363, 1371-1372.

[73] *Allan*, *supra*, 51 Cal.App.4th at page 1363.

[74] *Allan*, *supra*, 51 Cal.App.4th at page 1364.

in sports instruction.[75] Therefore, to the extent that a necessary or desirable part of training was to take on new challenges, an instructor cannot be held liable unless it was reckless to ask the plaintiff to do so.[76] As such, the doctrine of primary assumption of risk barred the plaintiff's claim because he never pleaded recklessness.[77]

The instant action falls on the *Galardi-Tan* side of the dichotomy rather than on the *Bushnell-Kane-Allan* side. *Bushnell*, *Kane*, and *Allan* present scenarios in which the instructors took their students along the natural progression of instruction. In *Bushnell*, the judo student had already mastered a basic maneuver at one speed and the instructor merely had the student improve his skills by performing the maneuver more quickly.[78] In *Kane*, the skiers were already considered expert skiers and were improving their rescue skills.[79] Members of the ski patrol are expected to rescue stranded or injured skiers. After the skiers obtained the requisite level of proficiency, the instructor challenged them to do exactly what they were there to do--improve their rescuing skills.[80] In *Allan*, the plaintiff completed the beginners' slope lesson successfully

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[75] *Allan*, *supra*, 51 Cal.App.4th at page 1369.

[76] *Allan*, *supra*, 51 Cal.App.4th at page 1370.

[77] *Allan*, *supra*, 51 Cal.App.4th at page 1371.

[78] *Bushnell, supra,* 43 Cal.App.4th at pages 531-532.

[79] *Kane, supra,* 88 Cal.App.4th at pages 206-207.

[80] *Kane, supra,* 88 Cal.App.4th at page 208.

and the instructor advanced the plaintiff to the next level.[81] These courses of conduct follow the natural progression of instruction.

Unlike the instant action, *Bushnell*, *Kane*, and *Allan* did not involve evidence of recklessness. Poulos, however, has pleaded recklessness; and on this record, there is evidence indicating that a triable issue of material fact remains as to whether Alpine increased the risks inherent in a mogul ski lesson through such recklessness.

Poulos claims, and the instructor admitted in his deposition, that the instructor was late for the lesson. Poulos asserts that Alpine's custom and practice is for the instructor to arrive at the lesson 15 minutes early to gather information about the students' skiing ability and experience. The record reflects that approximately an hour and a half passed between the beginning of the lesson and Poulos's fall. During this time, Poulos claims, the instructor had taken the class down only groomed intermediate runs, and across one small area with easy moguls on which Poulos fell twice; that he knew that Poulos had refused to ski another intermediate run because he deemed it too difficult; that he ignored Poulos's request to move into a more appropriate instruction group; and that he failed to instruct specifically on how to ski moguls prior to entering the "Chute that Seldom Slides" (the Chute)--the run where Poulos sustained his injuries.

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[81] *Allan, supra,* 51 Cal.App.4th at pages 1363, 1371-1372.

Additionally, Poulos claims that the instructor had the class enter the Chute below a posted sign indicating its level of difficulty--"black diamond," i.e., one of Alpine's hardest runs. Poulos presented evidence that on the day of the incident, the Chute was the equivalent of a "double black diamond run," i.e., an expert-only run. Though Alpine has objected to this "double black diamond" evidence on appeal, it did not do so in the summary judgment proceedings. Consequently, we may consider this evidence.[82] Furthermore, the instructor admitted that he rarely skied the Chute, did not usually take his students on the run, and could not remember the last time he had been on it. The instructor himself fell on the Chute as he entered it. True to its name, the Chute was a steep, narrow run that funneled into a heavily treed finish; on the day of the accident, the Chute and its moguls were visibly icy. As Poulos began to ski into the Chute, he slid into one student who slid into another; all three students then slid the length of the run into the trees below.

The *Knight* court noted that "vigorous participation in . . . sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct."[83] Thus, the court required a finding of reckless conduct--i.e., conduct totally outside the range

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[82] See Evidence Code section 353; see also *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, footnote 1.

[83] *Knight*, *supra*, 3 Cal.4th at page 318.

of ordinary activity involved in the sport.[84] Conduct is totally outside the range of ordinary activity involved in the sport if liability for that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.[85] In short, legal liability will not attach if it will interfere with the natural fervor with which athletes engage in sports activities.[86] *Kane* and *Allan* applied these principles to a ski instructor. Therefore, the concluding inquiry is: if legal liability is imposed against Alpine here, will such liability inhibit ski instructors from encouraging students to attempt new mogul ski challenges?

Under the standards set forth in *Galardi* and *Tan*, the increased risks presented by the reckless selection of unsafe terrain are not inherent in the sport of mogul skiing. Imposing liability for the reckless selection of teaching terrain will not deter instruction for skiing moguled terrain. Poulos has set forth facts that, if ultimately proved, extend far beyond the nonactionable, subjective assessment errors discussed in *Kane*; these facts do not evidence a natural progression of instruction. If the reckless conduct Poulos has set forth persuades the trier of fact, the imposition of liability for such conduct will not deter vigorous participation in mogul ski instruction, but will enhance participation in that sport.

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[84] *Knight*, *supra*, 3 Cal.4th at pages 320-321.

[85] *Freeman*, *supra*, 30 Cal.App.4th at page 1394.

[86] *Knight*, *supra*, 3 Cal.4th at pages 318-319.

We conclude that Poulos has raised a triable issue of material fact regarding whether Alpine increased the risks inherent in a mogul ski lesson by recklessly selecting unsafe terrain on which to conduct the lesson.

DISPOSITION

The judgment is reversed. The Pouloses are awarded their costs on appeal.

DAVIS, J.

We concur:

SCOTLAND, P.J.

BLEASE, J.